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No. 85-2121

In The
Supreme Court of the United States
October Term, 1985

STATE OF ARIZONA,
Petitioner,

vs.

WILLIAM CARL MAURO,
Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did a Fifth or Six Amendment violation occur when, in answer to a request from respondent's wife, after respondent stated he would not make a statement without a lawyer present but before he was charged or afforded a lawyer, the police allowed them to talk in front of an officer who openly recorded the conversation and then, in rebuttal at trial, the state introduced these recorded statements to counter respondent's claim of insanity that was based, in part, on his conduct later that same day?

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The Arizona Supreme Court's opinion holding that police conducted "illicit custodial interrogation" in violation of Mauro's Fifth Amendment right to counsel and that it was error to allow use of the tape recording in rebuttal to counter Mauro's evidence of his mental condition on that date. The opinion is reported at — Ariz. —. 716 P.2d 393 (1986).

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STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court which petitioner asks this Court to review was entered on February 25, 1986. The Arizona Supreme Court denied petitioner's motion for rehearing on April 15, 1986. Petitioner sought a writ of certiorari on June 13, 1986. This Court granted the petition on October 6, 1986. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

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CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

The pertinent part of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

———o———

STATEMENT OF THE CASE

On November 23, 1982, William Carl Mauro asphyxiated his seven-year-old son, David, by forcing a rolled-up sock and two cloth diapers deep into the child's throat and mouth. Mauro went to the bathroom to quiet David after the boy began crying. Mauro had imprisoned David for several days, often locking him in a cabinet under the sink. Mauro told David to "shut up, shut up." He did not answer when his wife went to the closed bathroom door to ask him to leave David alone. [R.T. of Jan. 10, 1984 (Trial) Vol. 4 at 567-68, 595, 601-03; R.T. of Jan. 12, 1984 (Trial) Vol. 6 at 1014-17, 1071.]

After he murdered David, Mauro took a small suitcase to the bathroom and stuffed David's body into it. He carried the suitcase to an empty field and buried it beneath logs. Mauro then walked to a near-by K-Mart store, asked employees to call the police, and told them that he had killed his son, that he had killed the devil. When police arrived. Mauro told them about the killing, and directed them to the body.

On the way to the station, Sergeant Allen advised Mauro of the *Miranda*[1] rights, but did not question him.

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Mauro responded that he understood. (J.A. at 68-69.) At the Flagstaff Police Department, Captain Latham and Detective Trimble, unaware that Mauro had received *Miranda* warnings, readvised him of those rights. (J.A. at 77.) Mauro said he did not want to talk to police without an attorney. When he said that, all questioning ceased. (J.A. at 81-82, 93, 98-99, 102-03.) Mauro remained in Captain Latham's office to facilitate the collection of physical evidence from him. (J.A. at 113-14.) A guard remained with Mauro because there were no secure rooms at that location. (J.A. at 72-73, 96-97.)

Mauro's wife, Linda, called police to inform them about the disappearance of Mauro and their son. She learned that Mauro had murdered their son and that he was under arrest. Police brought her to the station for an interview. (J.A. at 70-72.)

After Detective Manson questioned her, Mrs. Mauro wanted to speak to her husband. (J.A. at 112.) Because Manson felt she was "upset enough," he tried to dissuade her, telling her that he did not think it was a good idea.[2] (J.A. at 112.) But she insisted and Detective Manson told her he would check with his supervisor, Sergeant Allen. Allen agreed to Mrs. Mauro's request. (J.A. at

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2. Detective Manson testified:

> She said, I want to talk to Carl, and I said, I don't know why, why make it worse, you've already learned that your son's dead. You don't have to have anything to do with him if you don't want to.
>
> She says, no, I want to talk to Carl, and I said, I don't think it's a good idea, you know, why go through the emotional trauma. It's bad enough. Let's just leave it alone.
>
> She says, no, I want to talk to him, and it was at that point that I said, well, if it's okay with my supervisor, we'll go ahead and do it, so I contacted Sergeant Allen.

(J.A. at 112.)

74, 112.) He told Manson not to leave the two alone, and suggested that Manson tape record the meeting. (J.A. at 74-75.) Allen explained his reasons for having Manson present: (1) concern for Mrs. Mauro's safety; (2) ignorance about the extent of Mrs. Mauro's involvement; (3) the possibility that the two might concoct stories; and (4) the potential for an escape attempt. (J.A. at 75-76.) Sergeant Allen did not know what Linda Mauro had told Manson, and he considered her a possible suspect.

Allen had no reason to believe that Mauro might have mental problems when he acquiesced in Mrs. Mauro's request to see her husband.[3] (J.A. at 85-86.) No one asked or told Mrs. Mauro to question Mauro or act on behalf of the police. (J.A. at 116.)

Captain Latham overheard the conversation between Manson and Allen and concurred that safety was the primary purpose for police presence at the meeting between Mauro and his wife. (J.A. at 101.) Manson explained that he taped the brief conversation to preserve it. (J.A.

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3. Sergeant Allen explained it in the following manner:

> Mr. Mauro had been advised of his rights. He stated he understood them. He stated he wished an attorney, not to me, but to Detective Trimble and Captain Latham, so he was not going to be asked any questions.
>
> Mrs. Mauro was very shaken. She didn't know what she was going to do. She didn't have money. She needed to talk to her husband, try to find out what he wanted her to do, and so that was the purpose of allowing her to speak to Mr. Mauro, so that she could be self-assured and get any questions answered that she wished.
>
> It's not like we were having her go in and talk to him and when she left we were going to go back in and then try to interview him, because he had already wished an attorney. We could not interrogate him.

(J.A. at 81-82.)

at 137.) Before she saw Mauro, Detective Manson informed Linda Mauro that he would be present with a tape recorder. She agreed. (J.A. at 118-19.) He turned it on before entering the room. *(Id.)* The conversation between Mauro and his wife was brief. Seated 3-4 feet from Mauro, Manson held the tape recorder in his right hand, resting it on his knee. (*Id.;* J.A. at 221-24.)

In the conversation,[4] Mauro told his wife not to answer questions, to get an attorney, that a public attorney was

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4. The conversation is set out in the opinion of the Arizona Supreme Court as follows:

. . .

MRS. MAURO: Please—please, I don't know what to do. We should have put David in the hospital;

Please—I don't know what we're going to do. We should have went for help—we should have went for help.

APPELLANT: You tried as best you could to stop it.

MRS. MAURO: I—

APPELLANT: Shut up.

MRS. MAURO:—taken him to a mental hospital or something. What'll we do?

APPELLANT: Shut up.

DET. MANSON: Do you know a reverend or a priest or someone you can talk to—take care of David?

MRS. MAURO: No.

APPELLANT: Don't answer questions until you get rights of attorney before you find out what's going on. You tried to stop me as best you can. What are you going to do, kill me? You tried the best you can to stop me.

MRS. MAURO: I don't—we don't—I don't have money.

APPELLANT: There's a public attorney.

MRS. MAURO: I don't know.

APPELLANT: There's a public attorney. Why don't you just be quiet.

MRS. MAURO: I don't have any money to bury him. I don't have any money. All I got is enough money for the rent for the children and that's it.

(Continued on following page)

available, and that she was not at fault for failing to stop him. (J.A. at 242-43.)

Prior to trial, the prosecution stated its intention to use the conversation as rebuttal to an expected claim of insanity. [J.A. at 39-40, 45; R.T. of Dec. 1, 1983 (Evidentiary Hearing) Vol. 3 at 473, 530; R.T. of Dec. 2, 1983 (Evidentiary Hearing) Vol. 4 at 670.]

In the 21-day trial for first-degree murder and child abuse, a picture emerged of Mauro as an intelligent, articulate, sometimes violent individual, who fancied himself an evangelist and used his family as a captive congregation. Anyone posing the least resistance to his views was cast in the role of a "witch" or "devil." [*See e.g.*, R.T. of Jan. 12, 1984 (Trial) Vol. 6 at 892-911; R.T. of Jan. 18, 1984 (Trial) Vol. 9 at 1517-28.] In one psychiatrist's opinion:

> [W]hen I called him a compulsive person with paranoid traits, in other words, he's all too ready to expect opposition and hostility and scheming from other people, and I think that this is the way he perceived Linda and maybe Daniel and David as well.
>
> As far as having a mental illness on the morning of November the 23rd, the comments that I have just made would have to be taken into account with the observations of Daniel and Linda on that morning, and they would tell me that he was at the very time

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(Continued from previous page)

DET. MANSON: Did you want to talk to your husband any more?

MRS. MAURO: No, I can't talk to him.

APPELLANT: Then don't talk to me—get out.

MRS. MAURO: I don't know what to do. O.K.

(J.A. at 242-43.)

> that he went into the bathroom and choked and strangled and killed David, that he was in control and that he knew what he was doing, and that he was reacting to what he perceived as opposition to him and that he could not tolerate this vestige of resistance, even from a child in this weakened state, and that this is what precipitated the anger in him, which ultimately ended in the homicidal act.

[R.T. of Feb. 7, 1984 (Trial) Vol. 18 at 3341.]

As part of his insanity defense, Mauro presented the testimony of Bruce Griffen, an attorney with the firm representing Mauro. Griffen observed Mauro after his initial appearance, the same day as the earlier conversation between Mauro and his wife. Griffen described Mauro as "catatonic," in a trance-like state, and totally uncommunicative; Mauro did not appear to realize Mr. Griffen and Mr. Bayles, another attorney from the firm, were trying to talk to him. Griffen thought that Mauro was "crazy." (J.A. at 150-53.)

The defense also offered a tape-recording of Mauro and Don Bayles, made on the same date, as further evidence of Mauro's mental condition that day. (J.A. at 180-81, 184-85.)

The defense relied on the testimony of Dr. Gerstenberger, a psychiatrist, who described in detail his observations of and conversations with Mauro on the day of the crime. (J.A. at 164-69, 175-76, 178-81, 184.) Dr. Gerstenberger described Mauro as "wild-eyed," extremely agitated, disoriented with disjointed responses. (J.A. at 176-77.) He testified that Mauro's behavior, depicted in Defendant's Exhibit Number 172 (a tape of Mauro made on November 23 by Mr. Bayles), was similar to the way Mauro appeared to him on the same day. (J.A. at 180-81.)

The tape was admitted and played to the jury. (J.A. at 185.) Dr. Gerstenberger concluded that Mauro suffered from psychotic symptoms on the day of the murder. (J.A. at 175, 180-81.)

The behavior observed by Dr. Gerstenberger contrasted sharply with the manner in which Mauro acted during his conversation with his wife earlier in the day, closer in time to the murder. Dr. Gerstenberger admitted at the evidentiary hearing, and in surrebuttal, that during the conversation with his wife, Mauro appeared to be in touch with reality.[5] [J.A. at 142, 144; R.T. of Feb. 9, 1984 (Trial) Vol. 20 at 3560-66.]

In rebuttal the state offered the taped conversation between Mauro and his wife. The trial court ruled the evidence admissible, finding no impermissible police conduct and no *Miranda* violation. The trial court noted that questioning ceased when Mauro elected to say nothing unless counsel was present. The trial court found that police presence at the conversation was not a ruse or subterfuge, and that police did not create the situation as an indirect means of violating *Miranda*. The trial court also noted the importance of the tape in view of defense counsel's use of conversations with Mauro, taped later

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5. A: [BY DR. GERSTENBERGER:]

. . . As I said earlier, at that point he was much better grounded in reality.

Q. Isn't it fair to say that that tape shows that he was very much grounded in reality?

A. At that time, yes.

[R.T. of Feb. 9, 1984 (Trial) Vol. 20 at 3565.]

the same day, to establish Mauro's mental state. (J.A. at 216-20, 226-27.) The state limited use of this evidence to closing and rebuttal, asserting that it was probative of Mauro's mental state near the time of the crime. (J.A. at 228-30.)

On appeal, the Arizona Supreme Court reversed Mauro's convictions for first-degree murder and child abuse. *State v. Mauro,* — Ariz. —, 716 P.2d 393 (1986). (J.A. at 231-52.) That court held that police violated Mauro's Fifth Amendment rights by allowing the conversation between Mauro and his wife to commence after Mauro had invoked his *Miranda* rights, and that this amounted to the "functional equivalent" of interrogation under *Rhode Island v. Innis,* 446 U.S. at 291 (1980). Relying on *Wainwright v. Greenfield,* — U.S. —, 106 S.Ct. 634 (1986), the Arizona Supreme Court also held impermissible the presentation of the tape to the jury as a basis for determining Mauro's sanity.

The Arizona Supreme Court denied the state's motion for rehearing on April 15, 1986, and the state filed for a writ of certiorari on June 13, 1986. This Court granted the petition for writ of certiorari on October 6, 1986.

SUMMARY OF ARGUMENT

Police did not violate Mauro's Fifth or Sixth Amendment rights to counsel by "allowing a conversation to commence" in their presence. The Fifth Amendment protections of *Miranda* apply where official compulsion,

coupled with custody, is likely to overbear the accused's will. Where police conduct bears no such indicia, it does not constitute the functional equivalent of interrogation under *Rhode Island v. Innis.*

The Sixth Amendment right to counsel ensures the assistance of counsel following initiation of adversary criminal proceedings and curbs governmental interference with the accused's right to rely on counsel once the criminal process has begun. Where the Sixth Amendment right to counsel has not attached, and its concerns are not present, the reasoning in Sixth Amendment cases is inapplicable to questions of interrogation under the Fifth Amendment.

The due process considerations in *Wainwright v. Greenfield* that led this Court to prohibit comment on an accused's silence, after *Miranda* warnings, as evidence of sanity, were misapplied to exclude this evidence because Mauro was not silent and did not rely on *Miranda* warnings during the conversation with his wife. Exclusion is particularly inappropriate where the evidence is highly probative and used only in rebuttal for the limited purpose of countering defense evidence of insanity.

ARGUMENT

I. THE FIFTH AND SIXTH AMENDMENTS PROTECT SEPARATE RIGHT-TO-COUNSEL INTERESTS THAT DO NOT WARRANT THE APPLICATION ADOPTED BY THE ARIZONA SUPREME COURT.

The question in this case is whether, under the circumstances, Mauro was subjected to "interrogation" after invoking his Fifth Amendment right to counsel because

police "allowed a conversation to commence" with his wife. A corollary of that is the validity of the Arizona Supreme Court's holding that this Court's analysis of the right to counsel under the Sixth Amendment is "equally applicable" in this Fifth Amendment setting. Finally even if a constitutional violation occurred, was the state nonetheless entitled to use those statements, solely in rebuttal, to counter Mauro's evidence of his mental state on the day he murdered his son? The Arizona Supreme Court has used the Sixth Amendment right-to-counsel analysis to define "interrogation" under *Miranda* in a Fifth Amendment context. In so doing, that court has expanded the definition of "interrogation" under the Fifth Amendment beyond that set forth by this Court in *Rhode Island v. Innis,* to include Sixth Amendment analysis that is unwarranted by this Court's decisions and especially inappropriate under the facts of this case.

A. The Fifth Amendment right to counsel ensures the privilege against compulsory self-incrimination.

The Fifth Amendment, applied to the states through the Fourteenth Amendment, guarantees the privilege against compulsory self-incrimination. In *Miranda v. Arizona,* 384 U.S. 436 (1966), this Court established procedural safeguards to protect the exercise of that privilege from the inherently coercive effects of custodial interrogations. *Miranda* recognized that custodial interrogations are, by their very nature, "compelling pressures" which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. *Moran v. Burbine,* — U.S. —, 106 S.Ct. 1135

(1986), *citing Miranda v. Arizona,* 384 U.S. at 467. Thus, when a suspect in custody requests the assistance of counsel, all interrogation must cease until an attorney is present. *Miranda v. Arizona.* This is not to say that all statements made after a suspect is in custody must be considered the product of interrogation. The test is as follows:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. at 301 (footnotes omitted). The "fundamental import" of the privilege, therefore, prevents interrogation, or its functional equivalent, not suspect speech. *Rhode Island v. Innis,* 446 U.S. at 300-301, citing *Miranda v. Arizona,* 440 U.S. at 478. *Miranda* itself specifically exempts "volunteered statements of any kind" from the definition of interrogation. *Innis* thus reasons that interrogation under *Miranda* must reflect "a measure of compulsion above and beyond compulsion inherent in custody itself." 446 U.S. at 300.

As an added degree of protection against coercive police practices, the focus under *Innis* is on the perceptions of the suspect rather than the intent of the police. 446 U.S. at 301. *Innis* makes clear that police are not held accountable for the unforseeable results of their words or actions; consequently, the caveat in defining interrogation as "words or actions on the part of police officers that they *should have known* were reasonably likely to

elicit an incriminating response." 446 U.S. at 302. The Fifth Amendment right to counsel extends through the investigative process until the judicial process commences. It provides protection prior to the initiation of criminal proceedings. After initiation of criminal proceedings, the protection afforded by the Sixth Amendment comes into play.

B. The Sixth Amendment ensures the assistance of counsel at all critical stages after the initiation of adversary criminal proceedings.

The Sixth Amendment right to counsel protection, on the other hand, involves considerations different from the Fifth Amendment. This right attaches at the commencement of adversary proceedings. *Massiah v. United States,* 377 U.S. 201 (1964); *McLeod v. Ohio,* 381 U.S. 356 (1965) (Sixth Amendment applicable to states). In *Kirby v. Illinois,* 406 U.S. 682 (1982), this Court acknowledged that in a long line of cases originating with *Powell v. Alabama,* 287 U.S. 45 (1977), it has become firmly established that the Sixth Amendment right to counsel attaches only after adversary proceedings have begun.

In *United States v. Gouveia,* 467 U.S. 180 (1984), this Court affirmed the attachment of Sixth Amendment right-to-counsel protections at the initiation of adversary proceedings, noting the "plain language of the amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary . . . ." The Sixth Amendment right to counsel is limited to confrontations occurring after initiation of adversary proceedings because it is only then that the government has committed itself to prosecute, and only then that the adverse positions of the parties solidify. *Kirby v. Illinois.* The pur-

pose of the Sixth Amendment, as reiterated recently in *Moran v. Burbine,* is to assure that the accused is not left to his own devices in a criminal prosecution. That right is not triggered by pre-indictment custodial interrogations.

This Court has rejected attempts to enlarge the definition of adversary proceedings to include arrests or investigations prior to arrest. *See United States v. Gouveia; Hoffa v. United States,* 385 U.S. 293 (1966). A pretrial Sixth Amendment claim depends upon the initiation of adversarial proceedings, and the pretrial confrontation must concern a critical stage at which the presence of counsel is necessary to preserve the right to a fair trial.

The relevant inquiry under the Sixth Amendment is whether the government has interfered with the right to counsel by deliberately eliciting incriminating statements in the absence of counsel. *Massiah v. United States.* This may occur in cases of direct questioning, or where the government intentionally creates an opportunity to confront the accused without counsel present. *United States v. Henry,* 447 U.S. 264 (1980) (intentional planting of informant in accused's cell for purpose of eliciting incriminating statements violates Sixth Amendment). In *Maine v. Moulton,* — U.S. —, 106 S.Ct 477, 487 (1985), this Court reiterated the guarantees of the Sixth Amendment right to counsel:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner

> that circumvents the protection accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the *Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. See Henry,* 447 U.S. at 276, 100 S.Ct., at 2189 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

(Emphasis added.)

C. The Sixth Amendment standard of "interrogation" does not apply to Fifth Amendment concerns.

Recently, in *Kuhlmann v. Wilson,* — U.S. —, 106 S.Ct. 2616 (1986), this Court again examined the Sixth Amendment right to counsel and discussed the meaning of the "deliberately elicit" standard of *Massiah.* The purpose of adopting this standard in the context of the Sixth Amendment, rather than simply determining whether the statements were obtained by interrogation, is to protect the accused from "indirect and surreptitious interrogations" as well as jailhouse interrogations, where the government interrogates by means of an agent after iniation of the criminal process. *Kuhlmann v. Wilson,* 106 S.Ct. at 2629. In *United States v. Henry,* the Court found

that the government informant "deliberately" used his position to secure information in the absence of counsel by stimulating conversation in order to elicit information —thus like *Massiah,* engaging in "indirect and surreptitious interrogatio[n]," *Kuhlmann v. Wilson,* 106 S.Ct. at 2629. Similarly, the *Kuhlmann* court noted the emphasis in *Maine v. Moulton,* on the relationship between the defendant and the informant; the informant's engaging the defendant in conversation about their upcoming trial was certain to elicit incriminating statements pertaining to those charges. This was a violation of the Sixth Amendment. 106 S.Ct. at 2629. The same "investigatory techniques," however, that result in incriminating statements in circumstances to which the Sixth Amendment has not attached, are, of course, admissible at trial. *Kuhlmann v. Wilson,* 106 S.Ct. at 2630 n.21, citing *Maine v. Moulton,* 106 S.Ct. at 479. Such a finding assumes that where the concerns of the Sixth Amendment are not present, even conduct that arguably violates that right does not warrant finding a violation under the Fifth Amendment. *See also Michigan v. Jackson,* — U.S. —, 106 S.Ct. 1404, 1409 n.5 (1986) (differentiating between otherwise similar methods of investigation, depending on whether Fifth or Sixth Amendment rights are implicated).

The Sixth Amendment standard of "deliberately eliciting" and "knowing exploitation" requires more than mere "presence":

> As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since the

> "Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," [citation omitted] a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported the incriminating statements to the police. Rather, the defendant must demonstrate that the *police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.*

Kuhlmann v. Wilson, 106 S.Ct. at 2630 (emphasis added).

Thus, the Arizona Supreme Court misapplied the "knowing exploitation" standard of *Moulton* in this Fifth Amendment context. Moreover, under either standard, there was no impermissible police conduct here. Police neither "interrogated" Mauro, nor by their conduct "deliberately elicited" incriminating remarks.

II. MAURO'S STATEMENTS TO HIS WIFE WERE NOT THE RESULT OF "INTERROGATION" AS DEFINED BY RHODE ISLAND v. INNIS, AND THEREFORE, NOT VIOLATIVE OF HIS FIFTH AMENDMENT RIGHTS.

There is no question that a suspect who invokes his right to counsel is not subject to interrogation by police until counsel is present. When Mauro, after *Miranda* warnings, requested counsel, he exercised his Fifth Amendment right against self-incrimination.

There was no interrogation by police. "Interrogation" under *Miranda* means more than express questioning, but it does not include all statements resulting from police words or actions. The rule is set forth in *Rhode Island v. Innis,* 446 U.S. at 301:

> "[I]nterrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. [Footnotes omitted.]

Police did not question Mauro after he invoked *Miranda*. Indeed, prior to Mauro's conversation with his wife, there were no words exchanged between Detective Manson and Mauro. (*See* J.A. at 242-43.) Linda Mauro began the conversation with her husband. Detective Manson was conspicuously present, clearly within earshot, and openly tape recording the exchange. (*Id.*)

The Arizona Supreme Court found interrogation from what it held to be "clear" police intent—allowing the conversation to commence with the knowledge that if the conversation took place, "incriminating statements were likely to be made."[6] (J.A. at 245.)

The "functional equivalent" definition under *Innis* focuses heavily on the suspect's perceptions, not only the intent of the police. *Rhode Island v. Innis*, 446 U.S. at 301. That the Arizona Supreme Court focused almost exclusively on assumed police intent, rather than Mauro's perception, shows a clear misapplication of Fifth Amendment principles. The Arizona Supreme Court's failure

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6. The testimony set out by the Arizona court in its opinion does not support this finding. (J.A. at 241-42.) Rather than testify that they knew incriminating statements "were likely to be made," as the Arizona Supreme Court suggests, both detectives testified only that they knew it was "possible that [Mauro] might make" or "may have given" an incriminating statement. This is a far cry from knowledge that incriminating statements were likely to be made.

to focus primarily on the suspect's perceptions ignores the fact that the *Miranda* safeguards were designed to vest the suspect with added protection against coercive police practices. *Rhode Island v. Innis,* 446 U.S. at 301.

Had the Arizona court scrutinized Mauro's perception of the situation, it is clear that no "interrogation" would have been found. The officer openly monitored the conversation, and Mauro knew he was there. He knew from two previous *Miranda* warnings that anything he said could and would be used against him. Police said and did nothing to bring about the conversation or direct its content. Indeed, Detective Manson tried to dissuade it. Nothing in the officer's conduct invited any response. In no sense did police interrogate Mauro.

Police intent has a bearing on whether they should have known that their actions were reasonably likely to evoke an incriminating response. This Court in *Innis* noted that where a "police practice is designed to elicit an incriminatory response from the accused, it is unlikely that the practice will not also be one which police should have known was reasonably likely to have that effect." 446 U.S. at 301 n.7. The record here supports no such finding. The Arizona Supreme Court's contrary conclusion that the police intended to interrogate, has no support in the record. For example, the Arizona Supreme Court considered that, prior to the conversation, Mrs. Mauro told Detective Manson about her husband's history of mental illness and his behavior before and after the homicide. (J.A. at 240-41.) It did not point out, however, that Sergeant Allen who made the decision to "allow the conversa-

tion," and whose intent presumably was of paramount importance, was not privy to the conversations between Manson and Linda Mauro. (J.A. at 85-86.) Clearly then, Sergeant Allen's intent did not hinge upon any knowledge of an "unusually disoriented or upset individual," a factor considered in *Innis* to be of significance in determining police intent. Moreover, Detective Manson, the officer who interviewed Linda Mauro at the station, did not authorize the conversation, did not believe it was a good idea, and informed both Mrs. Mauro and his supervisor of this fact. (J.A. at 112.) The evidence does not sustain a conclusion that either Allen or Manson intended to interrogate Mauro indirectly through his wife.[7]

Additionally, the officers testified that Mauro's behavior at the station manifested nothing out of the ordinary. (J.A. at 77-78, 93-95, 98, 103-04, 129-31.)[8] The

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7. An examination of Detective Manson's conduct also supports a finding of lack of intent to interrogate. For instance, police did not try to use the presence of Mrs. Mauro as a confrontation-technique method of interrogation. (J.A. at 81-87.) In fact, when he accompanied her to the police station, Manson avoided any inadvertent meeting of the two parties. (J.A. at 112.) This evidence further supports a finding that police did not engage in a practice "designed to elicit" incriminating responses. *See Rhode Island v. Innis*, 446 U.S. at 301 n.7.

8. Moreover, despite the obviously emotion-charged atmosphere at the K-Mart store when Mauro first reported the killing, there was substantial evidence of Mauro's rational behavior with police. For example, he acknowledged that he killed his son, he told the police where the body could be found and he directed the police to the location of the suitcase when police initially could not find it. Mauro even acknowledged to police that he could be considered dangerous by suggesting that he could show police the location of the body after he was

(Continued on following page)

content of the conversation bears out this observation. Mauro was rational, coherent and certainly appeared in touch with reality. There is nothing in this record suggesting that officers were aware that he was somehow "particularly susceptible" to this "police conduct"; nor could they reasonably be expected to know that allowing his wife to talk to him would likely result in incriminating statements. More importantly, the police in no way brought about the meeting or controlled the content of the conversation. Therefore, here, even more so than in *Innis*, the record does not show that the officer's conduct was "particularly 'evocative.'" 446 U.S. at 303. The police "action" under scrutiny here simply amounts to their justifiable presence at a brief encounter between Mauro and his wife, initiated by Mrs. Mauro, and acquiesced in by police out of sympathy for her plight, not as a surreptitious means of impermissible interrogation. Mauro was free to engage in conversation with his wife or not; he was the sole master of the content of his statements. Mauro plainly knew the police were present and could see that the conversation was being recorded.[9]

(Continued from previous page)

secured in handcuffs. He also expressly told officers at the scene that he would not harm anyone. [R.T. of Nov. 30, 1983 (Evidentiary Hearing) Vol. 2 at 261-65, 278, 295A, 304, 323.] According to the officers, Mauro appeared to be rational, albeit understandably upset. (*Id.* at 278, 295A, 304.) Mauro's over-all behavior supports the officers' conclusion that Mauro was rational.

9. Petitioner maintains that the presence of the tape recorder is irrelevant to determining the question of whether police interrogated Mauro in view of the fact that police presence was obvious. Since no interrogation occurred by police allowing the conversation to commence in their presence, the fact that the meeting was openly recorded, does not alter this finding.

The Arizona Supreme Court also relied on the fact that police asknowledged the *possibility* of incriminating statements to presume the intent to interrogate. That kind of analysis leads to the conclusion that the no-interrogation rule of *Miranda* can be satisfied only if police profess to believe there is no possibility of incriminating statements, or the circumstances establish purely accidental discovery of incriminating statements. This Court rejected that reasoning in *Innis:*

> But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. at 302 (footnote omitted).

Under the Arizona Supreme Court's analysis, if police candidly admit that an incriminating statement is "possible,"—and it almost always is—they have evinced a design to interrogate. Awareness of a possibility is surely not equivalent to a *motive* to circumvent Fifth Amendment rights. The Seventh Circuit's analysis in *United States ex rel. Church v. DeRobertis,* 771 F.2d 1015 (7th Cir. 1985), illustrates this point. In that case, police officers, knowing that the defendant's brother would try to persuade him to confess, placed the two together in a cell, apparently at the brother's request. 771 F.2d at 1017. The defendant had twice invoked his rights and police ceased questioning him. After his brother's urging, he notified police that he wished to talk. Police readvised him of *Miranda* rights, obtained a waiver, and gave him paper

and pencil with which to write out his confession. The Seventh Circuit found this no different than if the confession had been written out at the brother's urging in the absence of police and given to police. It also rejected the defendant's contention that police "interrogated" him by putting his brother in his cell, knowing he would urge the defendant to confess:

> [T]he detectives knew there was a chance that Kelly would persuade Michael to confess. This does not mean, however, that putting Kelly in the cell was "interrogation." The words of an opinion such as *Innis* draw their scope from the concerns the Court addresses. The Court was concerned about official trickery. . . . The Court has consistently held that where the central concerns of *Miranda* are not activated—where in some category of cases there is no plausible argument that the police are using some device to undercut the privilege against self-incrimination—the *Miranda* rules do not apply.
>
> . . .
>
> Unless an element of potential trickery or overbearing by the police is part of the definition of "nonverbal interrogation," *almost anything that produces a confession would be interrogation. Innis* rejects such a test of but-for causation. Suppose the police put a Bible in a suspect's cell, or permit him to attend a religious service at his request. Or suppose they simply leave paper and pencil in his cell. Are these things "interrogation"? But for the paper and pencil the suspect could not write out his written confession, yet there is nothing about the action of leaving writing implements in the cell that comes close to "compulsion" as that word is used in the privilege against self-incrimination.

771 F.2d 1015, 1018-19 (emphasis added; footnote omitted). So too, here, condemning as interrogation "allowing a

conversation to commence" amounts to application of a "but-for cause of a confession" test. Adoption of such a standard by the Arizona Supreme Court applies an interpretation to *Innis* that does not withstand logical scrutiny. As noted in *DeRobertis,* and recognized in *Innis,* not everything leading a suspect to speak amounts to interrogation.

The fact that police may have realized the possibility of a statement from one or both parties is more a product of accurate and reasonable police investigation prior to charging rather than a function of impermissible police practices. Mauro spoke to his wife because he wished to continue directing her activities, and, apparently, to keep her from aiding the investigation.

If a suspect confesses because of some sort of "subtle compulsion," that does not mean he has been "interrogated." The Arizona Supreme Court's reasoning is as flawed as the Rhode Island Supreme Court's in equating "subtle compulsion" with interrogation:

> The Rhode Island Supreme Court erred, in short, in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions *on the part of police* that they should have known were reasonably likely to elicit an incriminating response. This was not established in the instant case.

Rhode Island v. Innis, 446 U.S. at 303 (emphasis added; footnote omitted).

"Allowing the conversation to commence" is not such a practice. It bears none of the indicia of police practices cited in *Innis:* that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. 446 U.S. at 299. *Innis* cites as examples of impermissible police conduct, practices such as: the use of a coached witness at a lineup to establish defendant's guilt as a predicate to further interrogation; the "reverse line-up" to identify defendant by coached witnesses of a fictitious crime; various psychological ploys such as positing the guilt of the subject, minimizing the moral seriousness of the crime, and casting blame on the victim or society. *Rhode Island v. Innis,* 446 U.S. at 299. "Allowing the conversation to commence" is not comparable to any of these. Mrs. Mauro's presence, not police conduct, resulted in Mauro's statements. That her unsolicited request to speak to her husband and her unrehearsed comments may have persuaded him to speak, does not transform the statements into a product of police action that they should have known was reasonably likely to elicit an incriminating response.[10] By happenstance,

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10. Like the situation in *Rhode Island v. Innis,* 446 U.S. at 303 n.9, the record here does not suggest the officer's conduct was designed to elicit a response. The trial judge who heard the officer's testimony, expressly found that other considerations motivated acquiescing to Mrs. Mauro's insistent requests to see her husband and that police presence was not a "ruse" or "subterfuge" to interrogate. (J.A. at 218.) The unchallenged fact that the request for the meeting originated with Mrs. Mauro further strengthens a finding of lack of any *design* by police to elicit a response. The same holds true considering that police had no prior discussion with Mrs. Mauro about the content of her conversation. Because police were merely present at the meeting, one is hard-pressed to find this conduct demonstrates a deliberate design to elicit a response.

her request gave officers an opportunity that they would otherwise not have had. Police neither originated the idea of the meeting nor orchestrated the content of the conversation. Mauro chose to talk openly in the presence of the police officer. The officer did not impermissibly interrogate Mauro by passively listening. Under the Arizona Supreme Court's expansive reading of *Miranda,* volunteered, spontaneous statements, as well as statements derived from official compulsion, would be excluded. The Arizona Supreme Court erred in so finding and its judgment should be reversed.

III. WAINWRIGHT v. GREENFIELD DOES NOT CONTROL THIS CASE BASED ON ITS FACTS OR UNDERLYING RATIONALE.

After erroneously finding that Mauro's statements to his wife constituted interrogation in violation of the Fifth Amendment under *Rhode Island v. Innis,* the Arizona Supreme Court also ruled that this evidence was impermissibly presented to the jury to assist them in determining Mauro's sanity. The court relied on this Court's opinion in *Wainwright v. Greenfield,* — U.S. —, 106 S.Ct. 634 (1986), as "instructive," and by way of footnote suggested that portions of the conversation "probably" violated Mauro's Fourteenth Amendment due process rights. (J.A. at 247-48.) Petitioner submits that the Arizona Supreme Court misapplied *Greenfield* and substantially departed from the intent of this Court's analysis.

Greenfield holds that the prosecution may not use a defendant's post-arrest post-*Miranda* warnings "silence"[11]

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11. Post-*Miranda* warnings "silence" includes muteness and the statement of a desire to remain silent as well as a desire to remain silent until an attorney has been consulted. 106 S.Ct. at 641 n.14.

as evidence of sanity, and that to do so violates the Due Process Clause of the Fourteenth Amendment. 106 S.Ct. at 633-34. In *Greenfield,* the prosecutor argued in closing that the specific occasions on which the defendant exercised his rights after *Miranda* warnings demonstrated a degree of comprehension inconsistent with his claim of insanity. 106 S.Ct. at 636-37. *Greenfield* held that the analysis of *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), was controlling. In *Doyle* the defendants took the witness stand and offered an explanation for their participation in the crime. On cross-examination, the prosecutor impeached their testimony by asking them why they had not explained their conduct at the time of arrest. This Court held that violated the Due Process Clause.

As noted in *Doyle,* the source of the unfairness in using *Miranda* silence as impeachment stems from the implicit assurances contained in the *Miranda* warnings that "silence will carry no penalty." Although the *Miranda* warnings carry no such express promise, this is implicit in the warnings received:

> Mr. Justice WHITE, concurring in the judgment in *United States v. Hale,* [422 U.S.] at 182-183 [95 S.Ct., at 2139-2140], put it very well:
>
> > "'[W]hen a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

> . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.'" *Doyle v. Ohio,* 426 U.S. at 618-619, 96 S.Ct., at 2245 (footnotes omitted).

Wainwright v. Greenfield, 106 S.Ct. at 638 n.5. As applied by *Greenfield,* the *Doyle* premise that it is fundamentally unfair to violate *Miranda's* implicit assurances, remains the same whether the issue is defendant's guilt, as in *Doyle,* or his sanity, as in *Greenfield.* It is this finding, the implied promise reliance, that is the basis of both the *Doyle* holding and the *Greenfield* prohibition. Conversely, where there is no implied promise, reliance or breach, there is no fundamental unfairness and no due process violation. *Greenfield* makes this clear. 106 S.Ct. at 638-40.

This Court has consistently refused to extend *Doyle* to cases where the implicit promise or breach of *Miranda* concerns are not present. *Wainwright v. Greenfield,* 106 S.Ct. at 639-40, citing *South Dakota v. Neville,* 459 U.S. 553 (1983) (no due process violation to comment on failure to take blood-alcohol test because warnings not of constitutional dimension and no implied assurances contained in warnings); *Fletcher v. Weir,* 455 U.S. 603 (1982) (no due process violation in cross-examination of testifying defendant about post-arrest silence in absence of *Miranda* warning); *Jenkins v. Anderson,* 447 U.S. 231, 240 (1980) (no due process violation in use of defendant's pre-arrest silence on cross-examination for impeachment purposes in absence of *Miranda* warnings, i.e.: "no governmental action" inducing the accused to remain silent); *Anderson v. Charles,* 447 U.S. 404 (1980)

(no due process violation when defendant makes post-arrest stantements after receiving *Miranda* warnings and statements used to impeach inconsistent exculpatory testimony at trial).

A. There was no "silence" in Mauro's conversation within the meaning of Miranda.

The Arizona Supreme Court's application of *Greenfield* to this case is unsound because it ignores both the facts that brought the *Greenfield* analysis into play and the rationale upon which it was based. Petitioner submits that *Greenfield* has no application to the instant case because the statements in question clearly did not constitute "silence" as defined by *Greenfield*. *Greenfield* defines silence as a refusal to speak in the face of *Miranda*, or an invocation of the right to silence or an invocation of the right to counsel under *Miranda*. During the conversation with his wife, Mauro admonished her not to speak and to get a lawyer. (J.A. at 242-43.) There was no *Miranda* "silence" in the conversation. He made no reference to his own silence or invocation of rights. *See e.g. United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978). In *Warren*, evidence was introduced that one defendant advised his co-defendant brother and another party not to say anything. The Fifth Circuit noted that the evidence did not imply the defendant had exercised the right to remain silent, rather, he merely admonished others not to speak. Admission of the testimony did not amount to a comment on the exercise of the defendant's right to remain silent.

The distinction between *Miranda* "silence" (muteness or invocation of rights) and statements, while not paramount to this Court's finding in *Greenfield*, is important

to the *Doyle-Greenfield* analysis. 106 S.Ct. at 639. It was the "ambiguity" of silence in the face of accusation that caused the Court to question the claim that such evidence had probative value for purposes of determining guilt or sanity. 106 S.Ct. at 640. Where statements are made, as here, there is no "ambiguity." *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements, because such questioning makes no unfair use of silence.

A defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. In *Anderson v. Charles,* 447 U.S. at 408, this Court rejected the Sixth Circuit's characterization that a due process violation occurred when the prosecutor questioned the defendant about his post-arrest failure to tell officers the same story he told at trial. This Court concluded that where the questions were not designed to draw an inference from silence, but to elicit an explanation for a prior inconsistent statement, *Doyle* does not apply. *Anderson v. Charles,* 447 U.S. at 409; *see also, Hockenbury v. Sowders,* 718 F.2d 155 (6th Cir., 1983). To remain "silent" within the meaning of *Doyle,* and hence *Greenfield,* requires more than lack of a statement—it requires reliance on *Miranda* warnings.

B. The state did not breach the implied assurance of Miranda warnings.

The critical factor in analyzing an alleged due process violation is whether the state breached its implied assurances that silence would not be used against the defendant. *Wainwright v. Greenfield,* 106 S.Ct. at 640. No

Greenfield violation occurred here. Unless there was "silence" in reliance upon *Miranda* warnings, the state could not have violated any implied assurances relating to *Miranda* silence. Mauro made statements to his wife. The conversation did not involve any assertion of, or reliance on, his own *Miranda* rights—rather, he voluntarily advised his wife and responded to her comments and questions. He spoke in front of the officer, who openly recorded the meeting. Mauro knew that his statements were being recorded. He knew from his earlier *Miranda* warnings that anything he said could and would be used against him. Having been so advised, he has no valid claim that the use of his statements was fundamentally unfair as a violation of the implied assurances flowing from invocation of his rights. The conclusion that no violation occurred here is even stronger than the position taken in the separate, concurring opinion by Chief Justice Rehnquist in *Greenfield,* that invocation of the right to counsel does not carry the same implied assurances that attach to the right to remain silent. 106 S.Ct. at 642.

The state's use of Mauro's statements to his wife did not violate *Wainwright v. Greenfield* nor the underlying rationale of that case. Since there was no use by the state of Mauro's post-*Miranda* "silence," nor any violation of *Miranda's* implied assurances, there was no due process violation.

C. The conversation was offered for the limited purpose of countering specific defense evidence of Mauro's mental state.

If one assumes, *arguendo,* that a Fifth Amendment violation occurred, this Court has recognized instances

where the use of *Miranda*-violative statements fulfills a legitimate function in promoting the primary objective of the adversary system of justice—the search for truth. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 722 (1975); *Harris v. New York*, 401 U.S. 222, 225 (1971). The same rationale applies here.

The state introduced Mauro's statements to counter[12] evidence offered by the defense aimed at establishing his unstable mental condition on the day of the murder. Specifically, the defense presented the testimony of one of his defense attorneys, Bruce Griffen, a psychiatrist, Dr. Gerstenberger, who recounted visits with Mauro the day of the murder, and a tape recording of a meeting between Mauro and defense attorney Donald Bayles. This tape was used to bolster Dr. Gerstenberger's opinion that Mauro was insane a few hours earlier, at the time of the killing.

At least one court has found the *Doyle* rationale inapplicable to a prosecutor's comment on post-*Miranda* silence made in direct response to defense arguments.

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12. In special action proceedings brought by the state prior to trial, the Arizona Supreme Court held that the statute concerning the insanity defense that was in effect at the time of the commission of the act would apply at trial, rather than the amended version of Ariz.Rev.Stat.Ann. § 13-502, which took effect after the date of the alleged crime but before trial. Under the former statute, a defendant could rebut the presumption of sanity by introducing evidence which generated substantial and reasonable doubt of his sanity. The state then had the burden of proving sanity beyond a reasonable doubt. Under the amended version of Ariz.Rev.Stat.Ann. § 13-502(B), a defendant must prove by clear and convincing evidence that he was not criminally responsible by reason of insanity. *State v. Coconino County Superior Court, Div. II*, 139 Ariz. 422, 426, 678 P.2d 1386, 1390 (1984).

Nichols v. Wainwright, 783 F.2d 1540, 1543 (11th Cir. 1986). In *Nichols,* the defendant argued that his behavior following his arrest was probative of the veracity of his defense. *Nichols* noted that *Greenfield* was inapplicable to this situation:

> *Greenfield*'s holding that the general defense of insanity does not invite comments upon or evidence of post-*Miranda* silence is inapplicable to the instant case in which the defense was specific in its reliance upon the proximity of the statement to the time of arrest. *Greenfield* neither specifically nor implicitly overruled footnote 11 of *Doyle v. Ohio* which permits comment upon post-*Miranda* silence in response to defense arguments....

783 F.2d at 1543 n.2.

It does not advance the goals of the criminal justice system to keep from the jury probative statements directly pertaining to sanity even if *Miranda*-violative. This is not a situation like *Greenfield,* where the state introduced the *Miranda*-violative evidence in its case-in-chief. It was Mauro's presentation of insanity evidence taken shortly after he conversed with his wife that made the conversation with his wife extremely probative. In this respect, the remedy outlined in *Greenfield* (that the state's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of arrest could be served by carefully framed questions avoiding the mention of the defendant's exercise of his rights), is ill-suited to the facts of this case. The defense did not rely solely upon evidence that Mauro appeared "irrational" at the time of his arrest and after, but offered selected portions of his words and conduct. To restrict the state's rebuttal to "carefully framed questions" that avoid any

"specific reference to this conversation" is to unjustifiably cripple the state's ability to test the credibility of Mauro's witnesses and respond to his defense.

This situation differs little from the case where a defendant chooses to set aside the protections of *Miranda,* gives testimony inconsistent with previous statements, and is thereby subject to impeachment with his previous statements. The Fifth Amendment is not violated when a defendant testifying in his own behalf is impeached with his pre-arrest silence because it follows his decision "to cast aside his cloak of silence" and advances the truth-finding function of the criminal trial. *Jenkins v. Anderson,* 447 U.S. at 238. In a similar sense, Mauro cast aside any reliance on the Fifth Amendment when he affirmatively offered the specific evidence he introduced at trial. As in the case of a defendant who chooses to testify:

> "[T]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown v. United States,* 356 U.S. 148, 156, 2 L.Ed.2d 589, 78 S.Ct. 622, 72 A.L.R.2d 818 (1958)

Jenkins v. Anderson, 447 U.S. at 238. Unwarranted exclusion of this probative evidence unduly hampers the jury's ability to judge the validity of the offered defense. The prevention of erroneous acquittals founded on false insanity pleas is a legitimate and important societal goal. *See Sulie v. Duckworth,* 689 F.2d 128, 131 (7th Cir. 1982), *cert. denied,* 460 U.S. 1643 (1983).[13] This Court should

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13. Petitioner recognizes that the *Sulie* court reached a conclusion contrary to that subsequently expressed by this Court in *Greenfield,* but submits that the above reasoning remains valid.

reverse the finding of the Arizona Supreme Court that *Wainwright v. Greenfield* precluded admission of the conversation between Mauro and his wife, under the circumstances it was offered, to rebut specific evidence of conduct and conversations pertaining to his mental condition at the time of his arrest. A new trial on these grounds is unjustified.

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CONCLUSION

The Arizona Supreme Court erred in finding a violation of the Fifth Amendment right to counsel. The Fifth Amendment protections of *Miranda* apply in situations where official compulsion, coupled with custody, are likely to overbear the accused's will and amount to a "compulsion" to testify against oneself. Where police conduct in "allowing a conversation to commence" between the suspect and his wife bears no such indicia, it does not constitute the functional equivalent of interrogation under *Rhode Island v. Innis*. Because the Sixth Amendment right to counsel had not attached and its concerns were not present, the Arizona Supreme Court erred in applying the reasoning of Sixth Amendment cases to the question of interrogation under the Fifth Amendment. Moreover, the due process considerations in *Wainwright v. Greenfield* that led this Court to preclude comment on an accused's invocation of the *Miranda* rights, or resultant silence as evidence of sanity, has been inappropriately applied by the Arizona Supreme Court to this case, which involves neither "silence" nor reliance on *Miranda* warnings. Finally, the Arizona Supreme Court erred in precluding ad-

mission of these highly relevant statements where they were used to rebut specific defense evidence on the issue of sanity.

The Court should reverse.

Respectfully submitted,

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